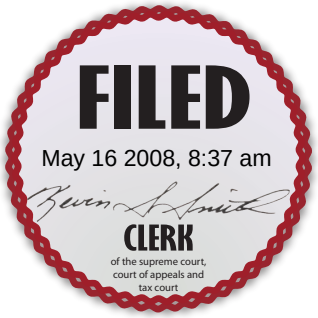

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IN THE
COURT OF APPEALS OF INDIANA

JOSHUA D. BURDINE,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 32A01-0711-CR-520
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE HENDRICKS SUPERIOR COURT
The Honorable Mark A. Smith, Judge
Cause No.32D04-0702-FC-2

May 16, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

ROBB, Judge

Case Summary and Issue

Following a bench trial, Joshua Burdine appeals his conviction of sexual misconduct with a minor, a Class C felony. Burdine raises the sole issue of whether sufficient evidence supports his conviction. Concluding insufficient evidence supports his conviction, we reverse.

Facts and Procedural History

On December 25, 2006, S.F., the sister of Burdine's fiancée, told her parents that she had performed oral sex on Burdine the day before.[1] The incident was reported to the Brownsburg police, who initiated an investigation. During an interview, S.F. told officers that one night when she was staying at her sister's apartment, Burdine had entered her room and fondled her breasts and vagina. S.F. told the officers that this incident occurred approximately one and one-half years prior to the interview. At the time of the interview, S.F. had just turned seventeen. At all times, Burdine has denied touching S.F. in any inappropriate manner.

On February 12, 2007, the State charged Burdine with one count of sexual misconduct with a minor based on the alleged fondling. On August 24, 2007, the trial court held a bench trial and found Burdine guilty. On October 2, 2007, the trial court

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[1] At Burdine's trial, extensive testimony was given regarding this occurrence. As S.F. was seventeen at the time of this alleged incident, Burdine's conduct was not illegal. We are somewhat at a loss as to how testimony regarding this encounter was admissible regarding whether Burdine was guilty of the charged incident. See Ind. Evidence Rule 404(b) ("Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith."). We do note that Burdine called two witnesses whose testimony questioned the credibility of S.F.'s account of the second incident, and therefore, Burdine may have sought to discredit S.F.'s testimony regarding the charged incident by attacking her credibility regarding the second incident.

held a sentencing hearing and sentenced Burdine to three years, with two years suspended to probation. Burdine now appeals his conviction.

Discussion and Decision

I. Standard of Review

When reviewing a claim of insufficient evidence, we will not reweigh evidence or judge witnesses' credibility. Grim v. State, 797 N.E.2d 825, 830 (Ind. Ct. App. 2003). We will consider only the evidence favorable to the judgment and the reasonable inferences drawn therefrom. Id. We will affirm a conviction if the lower court's finding is supported by substantial evidence of probative value. Id.

Our supreme court has recently summarized our standard of review when assessing claims of insufficient evidence.

> When reviewing the sufficiency of the evidence to support a conviction, appellate courts must consider only the probative evidence and reasonable inferences supporting the verdict. It is the fact-finder's role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court's ruling. Appellate courts affirm the conviction unless no reasonable fact-finder could find the elements of the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted) (emphasis in original).

II. Sufficiency of the Evidence Regarding S.F.'s Age[2]

In order to convict Burdine of sexual misconduct with a minor, the State was required to prove that S.F. was "at least fourteen (14) years of age but less than sixteen (16) years of age." Ind. Code § 35-42-4-9(b). When a person's age is an element of the offense, the State must prove this element beyond a reasonable doubt. Staton v. State, 853 N.E.2d 470, 473 (Ind. 2006). The State must present "more than a mere scintilla of evidence," and must introduce evidence of "substantial and probative value." Bowens v. State, 578 N.E.2d 377, 379 (Ind. Ct. App. 1991). The State need not introduce evidence of a person's exact age at the time of the misconduct. See Warren v. State, 701 N.E.2d 902, 907 (Ind. Ct. App. 1998) ("Time is not of the essence in sex crimes against children."), trans. denied; Crabtree v. State, 547 N.E.2d 286, 290 (Ind. Ct. App. 1989) (affirming conviction where State did not introduce evidence of the victim's date of birth, but introduced testimony indicating that the victim was fifteen years old at the time of the misconduct), trans. denied. However, "[t]he exact date becomes important . . . where the victim's age at the time of the incident falls at or near the dividing line between classes of felonies." Warren, 701 N.E.2d at 907; see also Barger v. State, 587 N.E.2d 1304, 1308 (Ind. 1992) (recognizing that to support a conviction for child molesting there must be proof beyond a reasonable doubt that the victim was younger than some age); C.D.H. v. State, 860 N.E.2d 608, 613 (Ind. Ct. App. 2007) (reversing conviction for child

[2] Apparently recognizing that an argument regarding the sufficiency of the evidence as to whether the touching occurred would be a blatant request to reweigh the evidence, Burdine confines his argument to the sufficiency of the evidence establishing S.F.'s age at the time of the touching.

molestation where insufficient evidence existed to support a finding that the victim was younger than the defendant), trans. denied; Krebs v. State, 816 N.E.2d 469, 473 n.9 (Ind. Ct. App. 2004) ("The exact date becomes important only in limited circumstances, including the case where the victim's age at the time of the offense falls at or near the dividing line between classes of felonies.").

The following testimony regarding S.F.'s age was introduced at trial:

> Q: Do you remember an incident that took place in the fall of 2005 while you were over [at Burdine's apartment] with the Defendant?
> A: Yeah.

Tr. at 43.

> Q: Now this took place in the fall of 2005, is that right?
> A: Yes.
> Q: And how old were you at that time?
> A: 2005, um, fifteen (15), fourteen (14), fifteen (15).

Id. at 46.

> Q: Um, now I want to go back to the fall of 2005, if you don't mind. Was there any expecting, your sister was pregnant at that time, is that right?
> A: Yes.
> Q: How far along was she pregnant?
> A: Uh, six (6), seven (7) months, five (5), six (6), seven (7) months somewhere around there.

Id. at 49.[3]

> [Interviewing Police Officer]: Okay. And how long ago did they live [in the apartment where the alleged touching occurred]?
> [S.F.]: I think it's probably been about a year maybe.

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[3] We note that it does not appear that S.F.'s sister was in fact pregnant in the fall of 2005. Instead, it appears that she gave birth in March 2005. See Tr. at 145 (witness testifying that Burdine's son turned 2 in March 2007); id. at 157 (Burdine's fiancée testifying on August 24, 2007, that their son is 2 ½ years old).

[Interviewing Police Office]: So about a year ago?
[S.F.]: About a year, year and a half ago.

Id. at 68 (tape of interview played in open court).[4]

[Interviewing Police Officer]: And about how old were you when . . .
[S.F.]: Uh, I was fourteen (14), fifteen (15).

Id. at 70 (tape of interview played in open court).

[Interviewing Police Officer]: Okay and the other two (2) times you told me about you are fifteen (15), maybe fourteen (14)?
[S.F.]: (inaudible) it's been about three (3) years, so, (inaudible).

Id. at 78-79 (tape of interview played in open court).

Q: Uh, do you remember what month this happened? This is important, I would like to know if you can remember at least what month this occurred.
A: I don't remember what month.
Q: Uh, how did you happen to be at Brownsburg Pointe Apartments?
A: Um, my sister just had a baby.
Q: Oh, this was after the baby was born?
A. No, my sister was pregnant and I was over there.
Q: Well you just said it was after the baby, so, and now you are saying it was while she was pregnant, so it's got to be one or the other. Take your time.
A: I can't remember (inaudible).

Id. at 101.

Q: Is it possible that it might have been the winter time when you are over there and you are just not exactly sure?
A: I'm not exactly sure.

Id. at 102.

Q: Um, I just want to clear up some time elements here, were you in school when the incident occurred? . . .
A: It was summer, I was on break, summer break,

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[4] S.F. was seventeen at the time of this interview.

> Q: Okay, . . . what school were you getting ready to go into, if you can recall?
> A: Junior year.
> Q: Okay, and how old would that make you going into your junior year?
> A: Sixteen (16).
> Q: Sixteen (16), so when was it?
> A: When was it?
> Q: When did the event occur? This was the fall of 2005, right?
> A: Yes.
> Q: And when do you turn sixteen?
> A: December 24th.
> Q: Of what year, of that year?
> A: Yes.
> Q: Okay, so that would make you how old?
> A: Sixteen (16), I mean.
> Q: Okay, your birthday is in December?
> A: Yes.
> Q: And approximately four (4) months earlier is when this incident occurred according to your testimony, is that right?
> A: Yes.
> Q: Okay, how old would that make you if you turned sixteen (16) in December 24th, 2005, how old would that make you in the fall of 2005?
> A: Fifteen (15).

Id. at 107-08.

> [S.F.] told me that at the initial the offense that had occurred in Brownsburg had occurred in the fall of 2005 and of course she would not have turned sixteen (16) until December [] of 2005 . . . .

Id. at 119 (testimony of Officer Jennifer Pyatt)

> Q: So the fact of the matter is, we still don't know what month that this occurred . . .
> A: No, not month sir.
> Q: So it could have occurred in December of 2005, could it not?
> A: Not according to what she had advised me sir.

Id. at 121-122 (testimony of Officer Pyatt).

We conclude that a conviction may not be based on this testimony. Although S.F. testified at times that she was fourteen or fifteen at the time of the incident, and agreed

with the Prosecutor's questions that the event occurred in the Fall of 2005, at which point she would have been fifteen,[5] she also testified that she was sixteen at the time of the incident, that the incident occurred during the summer prior to her junior year of high school, at which point she was sixteen, and that she was "not exactly sure" whether the incident could have occurred during the winter after the fall of 2005, at which point she very well could have been sixteen, see supra, note 5.

Our supreme court recently addressed the sufficiency of evidence to establish age in Staton, where the defendant appealed his conviction of sexual misconduct with a minor, arguing that insufficient evidence existed to support a finding that he was eighteen at the time of the incident. Our supreme court affirmed the conviction based on testimony by the victim that she "imagined" or "understood" the defendant to be eighteen. Staton, 853 N.E.2d at 475. But see id. at 476 ("I cannot agree that the testimony of a sole 16-year-old witness that she 'imagine[d] and 'under[stood]' defendant to be over the age of 18 constitutes substantial evidence of probative value that, beyond a reasonable doubt, the defendant was over the age of 18.") (Sullivan, J., concurring and dissenting, joined by Rucker, J.). Were S.F. merely equivocal regarding the date of the incident, we would be compelled to affirm the conviction in light of our supreme court's decision in Staton. However, in this case S.F. gave not only equivocal testimony, but

[5] We note that Fall ends, and Winter begins, at the time of the winter solstice. See The American Heritage Dictionary of the English Language, 1973 (4th ed. 2000) (defining "winter" as "The usually coldest season of the year, occurring between autumn and spring, extending in the Northern Hemisphere from the winter solstice to the vernal equinox, and popularly considered to be constituted by December, January, and February"). In 2005, the winter solstice occurred on December 21, at 18:35 Universal Time. See http://aa.usno.navy.mil/data/docs/EarthSeasons.php (last visited May 12, 2008). Thus, S.F. turned sixteen roughly two days after Fall had ended.

also contradictory testimony. Therefore, we conclude this case is governed not by Staton, but by Barger v. State, 587 N.E.2d 1304 (Ind. 1992). In Barger, the defendant was charged with a child molestation that occurred in January or February. The victim

> testified that her birth date was on February 22, 1976, and that her twelfth birthday was February 22, 1988. She testified that the molestation occurred when she was eleven or twelve years old "between January and February" of the 1987-1988 school year during the cold months after Christmas. Other witnesses also testified but their testimony was no more helpful in establishing the time of the occurrence than that of the alleged victim.

Barger v. State, 576 N.E.2d 621, 623 (Ind. Ct. App. 1991), vacated 587 N.E.2d 1304.[6] Our supreme court held that the defendant could not be convicted of child molesting as a Class C felony, but could be convicted of child molesting as a Class D felony, which required that the State prove the victim was between twelve and fifteen years old. Barger, 587 N.E.2d at 1308. Our supreme court also stated, "Of course, if the alleged molestation occurred around the victim's sixteenth birthday and it was impossible to tell whether the victim was fifteen or sixteen, the choice would be between a lesser class felony and no felony. In that situation the defendant could not be convicted of any felony." Id. at 1308 n.3.

We recognize that it is the trial court's role to weigh evidence and judge witness credibility, that convictions may be based on circumstantial evidence, and that testimony need not be entirely consistent. Davenport v. State, 749 N.E.2d 1144, 1152 (Ind. 2001).[7]

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[6] Although our supreme court vacated the court of appeals' opinion, it agreed that "the State apparently cannot prove definitively whether the victim was eleven years old or twelve years old at the time of the molestation." Barger, 587 N.E.2d at 1306.

However, a conviction may not be supported solely by "evidence [that] lacks directness and freedom from uncertainty, qualities which substantive evidence of probative value must have." Vuncannon v. State, 254 Ind. 206, 208, 258 N.E.2d 639, 640 (1970) (reversing conviction that was based on testimony that "was not definite but in the alternative"). S.F.'s testimony that she is not sure whether the event could have occurred in the winter and testimony that the event occurred when she was sixteen during the summer preceding her junior year renders her testimony that she was fifteen and her implicit agreement with the prosecutor's leading questions[8] suggesting that the incident occurred in the fall of 2005 uncertain and insufficient to support a finding that S.F. was fifteen at the time of the incident.[9] See id.; Gaddis v. State, 253 Ind. 73, 80, 251 N.E.2d

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[7] The "incredible dubiosity" exception to this rule applies "where a sole witness presents inherently contradictory testimony that is equivocal or the result of coercion and there is a complete lack of circumstantial evidence of the appellant's guilt." Id. at 1152 n.4. We may apply this exception where there are "inherent contradictions within one witness' [sic] own testimony." White v. State, 846 N.E.2d 1026, 1032 (Ind. Ct. App. 2006), trans. denied. "If a sole witness presents incredibly dubious or inherently improbable evidence such that no reasonable person could believe it and there is a complete lack of circumstantial evidence, a defendant's conviction may be reversed." Holeton v. State, 853 N.E.2d 539, 541 (Ind. Ct. App. 2006). Although we do not find it necessary to invoke the "incredible dubiosity" exception, we note the exception to emphasize that review of the sufficiency of the evidence involves a holistic examination of the evidence introduced. That is, the fact that S.F. testified at one point that she was fifteen does not render the remainder of her testimony irrelevant to an examination of the sufficiency of the evidence.

[8] "A leading question is one which suggests to the witness the answer desired, indicates to the witness the real or supposed fact which the examiner expects and desires to have confirmed by the answer, is in the form of an assertion of fact, or which, embodying a material fact, admits of a conclusive answer in the form of a simple 'yes' or 'no.'" Vance v. State, 860 N.E.2d 617, 619 (Ind. Ct. App. 2007) (citations and quotations omitted).

[9] We take this opportunity to point out the dangers inherent in leading questions. Our rules of evidence recognize this danger, allowing leading questions on direct examination only when "necessary to develop the witness's testimony." Ind. Evidence Rule 611(c). Indiana courts have allowed leading questions when the witness is a child; young, inexperienced, and frightened; or a "weak-minded adult." Williams v. State, 733 N.E.2d 919, 922 (Ind. 2000). We limit the use of leading questions "in order to prevent the substitution of the language of the attorney for the thoughts of the witness as to material facts

658, 661-62 (1969) ("Where the state's chief prosecuting witness, by his own admission is unsure as to the identity of the criminal, and where other evidence or lack thereof would support such uncertainty, this court would hold that such identification, as a matter of law, is insufficient evidence, by itself, to prove appellant to be the perpetrator of the crime."); R.L.H. v. State, 738 N.E.2d 312, 316-17 (Ind. Ct. App. 2000) (testimony by witness that he was "not sure if it was [the defendant] or [another juvenile]" who threw a brick through a window was insufficient to support an inference that the defendant committed the offense); Reynolds v. State, 573 N.E.2d 430, 433 (Ind. Ct. App. 1991) (holding a witness's testimony that five bullets had been removed from a gun that can hold six bullets but that the witness "did not know whether or not the gun was still loaded

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in dispute." Id. Our supreme court also noted that "the apprehensive and vulnerable emotional state of a witness may well increase his or her susceptibility to suggestive questions and impair the accuracy of the resulting responses." Id. at 925.

We note that when S.F. was asked a non-leading question as to the time of the incident, she did not identify the Fall of 2005, but instead identified the summer before her junior year. Thus, S.F.'s responses to the leading questions were not cumulative of other consistent testimony. Cf. Riehle v. State, 823 N.E.2d 287, 294 (Ind. Ct. App. 2005) (holding that the defendant was not harmed by the State's leading questions as the witnesses response was "merely cumulative of, and less damaging than [another witness's testimony]"), trans. denied. Also, the leading questions pertained to a material and disputed element of the offense. Cf. Marsillett v. State, 495 N.E.2d 699, 708 (Ind. 1986) (noting that leading questions pertained to identity, which was not a disputed element of the offense at trial); Tecumseh Coal & Mining Co. v. Buck, 192 Ind. 122, 135 N.E. 481, 485 (1922) ("Such [leading] questions as to formal matters and facts not in controversy harm nobody, and often save time. But leading questions as to material facts in dispute, by which the language of the attorney is substituted for the thought of the witness, are always objectionable and often harmful.").

We make no holding as to whether these leading questions were improper, as no objections to the questions were made. Cf. Thompson v. State, 674 N.E.2d 1307, 1309 (Ind. 1996) (recognizing that "the use of leading questions on direct examination rests within the trial court's discretion"). However, we find it a pertinent consideration, when assessing the sufficiency of the evidence, that S.F.'s testimony indicating that the incident occurred in the Fall of 2005 was merely an agreement with the prosecutor, while her testimony indicating that the incident occurred at a later date or that she was not sure when the incident occurred came in response to non-leading questions. See Vuncannon, 254 Ind. at 208, 258 N.E.2d at 640 (holding insufficient evidence and noting that the evidence that tended to support the verdict was in the form of a witness's response to a prosecutor's question that was leading and had "the assumption included therein").

with one bullet" was insufficient to support a conclusion that the gun was loaded), trans. denied, disapproved of on other grounds, Al-Saud v. State, 658 N.E.2d 907 (Ind. 1995).

Conclusion

We conclude insufficient evidence exists to support Burdine's conviction and hereby vacate said conviction.

Reversed.

BAKER, C.J., and RILEY, J., concur.